[Cite as *Young v. FirstMerit Bank, N.A.*, 2011-Ohio-614.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94913**

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## KATHY YOUNG

PLAINTIFF-APPELLEE

vs.

## FIRSTMERIT BANK, N.A.

DEFENDANT-APPELLANT

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**JUDGMENT:**
REVERSED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-591332

**BEFORE:** Cooney, J., Celebrezze, P.J., and Jones, J.

**RELEASED AND JOURNALIZED:** February 10, 2011

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COLLEEN CONWAY COONEY, J.:

**{¶ 1}** Defendant-appellant, FirstMerit Bank ("FirstMerit"), appeals the trial court's decision granting class certification to plaintiff-appellee, Kathy Young ("Young"). After a thorough review of the record and applicable law, we conclude that the trial court abused its discretion in granting the class certification. We, therefore, reverse the judgment.

**{¶ 2}** FirstMerit is a National Banking Association, headquartered in Akron, Ohio. FirstMerit has 203 banking offices in 30 Ohio, Pennsylvania, and Chicago-area counties.

**{¶ 3}** In 2004, Young purchased a promissory note from Joanne Schneider ("Schneider"). Young's check, in the amount of $50,000, was made payable to Schneider and was deposited to Schneider's FirstMerit bank account.

**{¶ 4}** In 2005, Schneider was indicted on 163 counts in connection with a Ponzi scheme in which Schneider sold promissory notes in violation of the Ohio Securities Act.

**{¶ 5}** Ponzi schemes involve the sale of fraudulent securities to investors, with the promise of profitable returns. Initial investors often receive a high rate of return from

subsequent sales, in order to entice additional investors. These securities are in fact worthless, and investors generally lose most if not all of their investment.

**{¶ 6}** Schneider deposited the funds from the sale of these promissory notes into a bank account at a FirstMerit branch in Strongsville, Ohio. The account was held in her husband's name: "Alan C. Schneider, d.b.a. Mortgage Escrow Account." Young and other investors made their checks payable to this account. Deposits were made to this account, averaging between $500,000 and $2,500,000 monthly. Approximately 30,000 withdrawals were made from this account over a period of five years. Schneider made interest payments to initial investors with funds from the sale of promissory notes to new investors. Over 700 investors are known to have purchased fraudulent promissory notes, totaling $60.5 million.

**{¶ 7}** In March 2009, in exchange for all other counts being dismissed, Schneider pled guilty to a total of 13 counts, which included one count of engaging in a pattern of corrupt activity, one count of theft, three counts of the sale of unregistered securities, two counts of false representation in the sale of a security, one count of money laundering, and five counts of securities fraud. Schneider was sentenced to three years in prison. In *State v. Schneider*, Cuyahoga App. No. 93128, 2010-Ohio-2089, the State appealed her sentence and this court reversed and remanded, based on the mandatory statutory sentence of ten years. Schneider filed a motion to withdraw her plea, which the court denied in August 2010. Schneider has filed an appeal.

**{¶ 8}** Young filed a separate suit against FirstMerit. In its three-count complaint, Young alleges that FirstMerit participated in (1) aiding in the sale of unregistered securities by an unlicensed seller in violation of R.C. 1707.43(A),[1] (2) civil aiding and abetting of fraud,[2] and 3) civil conspiracy to commit fraud.

**{¶ 9}** Young moved for class certification. After a hearing, the trial court granted the motion and certified the following class:

**{¶ 10}** "All individuals, similarly situated who: i) purchased one or more "Mortgage Escrow" promissory notes, and (ii) tendered payment therefor by one or more checks, which were (iii) deposited into the "Mortgage Escrow" checking account maintained by Defendant, (iv) within five years of the commencement of this action."

**{¶ 11}** FirstMerit appeals, raising two assignments of error challenging the court's finding Young met the requirements of Civ.R. 23 for class certification.

Class Certification

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[1] R.C. 1707.43(A) states that "[e]very sale or contract for sale made in violation of Chapter 1707 of the Revised Code is voidable at the election of the purchaser. The person making such sale or contract for sale, and *every person who participated in or aided the seller in any way in making the sale or contract for sale, are jointly and severably liable to the purchaser*." (Emphasis added.)

[2] There is a question as to whether a claim for civil aiding and abetting fraud is a viable cause of action. See *Ohio Bur. of Workers' Comp. v. MDL Active Duration Fund, Ltd.* (S.D.Ohio 2007), 476 F.Supp.2d 809, 828.

**{¶ 12}** In *Hamilton v. Ohio Sav. Bank* (1998), 82 Ohio St.3d 67, 69, 694 N.E.2d 442, the Ohio Supreme Court stated the standard of review for decisions to certify a class action, as follows:

**{¶ 13}** "A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion. * * * However, the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied."

**{¶ 14}** Civ.R. 23 sets forth seven requirements that must be satisfied before a case may be maintained as a class action. Those requirements are as follows: (1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named representatives must be members of the class, (3) the class must be so numerous that joinder of all members is impracticable, (4) there must be questions of law or fact common to the class, (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three Civ.R. 23(B) requirements must be satisfied. Id.

**{¶ 15}** In an action for damages, the trial court must specifically find, pursuant to Civ.R. 23(B), that questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Id.

**{¶ 16}** The party seeking to maintain a class action has the burden of demonstrating that all factual and legal prerequisites to class certification have been met. *Gannon v. Cleveland* (1984), 13 Ohio App.3d 334, 335, 469 N.E.2d 1045. A class action may be certified only if the court finds, after a rigorous analysis, that the moving party has satisfied all the requirements of Civ.R. 23. See *Hamilton* at 70.

**{¶ 17}** Because we find the second assignment of error dispositive, we shall address it first.

Predominance

**{¶ 18}** In its second assignment of error, FirstMerit argues that the trial court abused its discretion by granting class certification because common questions of fact do not predominate. We agree.

**{¶ 19}** Performing a "rigorous analysis" of the Civ.R. 23(B)(3) predominance requirement necessitates an examination of "common" versus "individual" issues. A predominance inquiry is far more demanding than the Civ.R. 23(A) commonality requirement and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy. *Williams v. Countrywide Home Loans, Inc.*, 6th Dist. No. L-01-1473, 2002-Ohio-5499, citing *Jackson v. Motel 6 Multipurpose, Inc.* (C.A.11, 1997), 130 F.3d 999,

1005. Therefore, in determining whether common questions of law or fact predominate over individual issues, "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 313, 473 N.E.2d 822.

**{¶ 20}** The trial court began its analysis of class certification by enumerating the required elements of each cause of action. In regard to Count 2, we agree that to prove civil aiding and abetting fraud, plaintiffs first must prove the underlying fraud. A case for common law fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

**{¶ 21}** Count 3, a conspiracy to commit fraud, requires a "malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 419, 650 N.E.2d 863. An action for civil conspiracy cannot be maintained

unless an underlying unlawful act is committed. *Wilson v. Harvey*, 164 Ohio App.3d 278, 289-290, 2005-Ohio-5722, 842 N.E.2d 83, citing *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 219, 687 N.E.2d 481.

**{¶ 22}** In finding that the predominance requirement was met, the trial court stated in its opinion:

**{¶ 23}** "If the defendant violated O.R.C. 1707.43(A) as to any one plaintiff it violated that statute as to all plaintiffs; if the defendant and the Schneiders engaged in a civil conspiracy as to any one plaintiff they conspired as to all; and if the defendant aided and abetted fraud as to any one plaintiff it likely did so as to all plaintiffs."

**{¶ 24}** The trial court further reasoned that if the named plaintiffs can prove that they were defrauded, and if Schneider's guilty plea is not withdrawn, a fact-finder may be able to find in favor of all class members without specific evidence from each of them. We disagree.

**{¶ 25}** The issue of whether FirstMerit aided and abetted fraud and committed conspiracy, is dependent on proving the elements of fraud in regard to Schneider's sale of promissory notes. These elements are specific to each individual investor, i.e., amount invested, number of investments, return on the investment, external inducements, and representations made by Schneider.

**{¶ 26}** FirstMerit conducted numerous depositions prior to the certification hearing. Each plaintiff stated different reasons for investing their funds with Schneider.

**{¶ 27}** Some investors admitted they relied on the misrepresentations Schneider made. Others did not rely on her statements, but on those of previous investors, some of whom had in fact already seen returns on their investments. One investor never even met or spoke with Schneider. Some were induced by her sales pitch about real estate, others heard about her winery and restaurant projects. One investor admitted during his deposition that he knew he would get a return on his investment from subsequent investors and that he was entering a Ponzi scheme.

**{¶ 28}** The trial court found that the required element of reliance was not an "insurmountable obstacle." Relying on *Amato v. Gen. Motors Corp.* (1984), 11 Ohio App. 3d 124, 463 N.E.2d 625, the court stated that "if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class. Defendants may, of course, introduce evidence in rebuttal." The trial court erred in relying on *Amato*, which allows for a presumption of reliance on a class-wide basis only when the material misrepresentation is identical for each plaintiff. In the instant case, reliance cannot be presumed when the alleged misrepresentations are so varied. Moreover, some of the initial investors did in fact see high returns on their investments and, therefore, were not injured to the same extent as subsequent investors.

**{¶ 29}** Each fraud perpetrated by Schneider varied in its misrepresentations, reliance, inducement, and injury. It follows that FirstMerit's alleged liability is similarly varied.

These factual issues do not simply require damage calculations for each plaintiff, but would require mini-trials based on each set of facts and circumstances.

**{¶ 30}** Relying on *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 1998-Ohio-405, 696 N.E.2d 1001, and *Jenson v. Fiserv Trust Co.* (C.A.9, 2007), 256 Fed.Appx. 924, Young argues that class certification is appropriate because each plaintiff signed an identical promissory note.

**{¶ 31}** *Cope* involved the identical omission of standard disclosure warnings in the written insurance policies of every class member. The court in *Cope* recognized that when evidence of a defendant's deceitful or fraudulent conduct is set forth in a standardized contract distributed to many consumers and resulting in class-wide injury, then such a case is ideal for class certification. The *Cope* court reversed the denial of class certification because the claims involved were not based on any oral or affirmative representation, or any other actionable conduct occurring during pre-application sales negotiations. Id. at 432. Similarly, in *Jenson*, the court found that class certification was appropriate because identical misrepresentations were made to each member of the class.

**{¶ 32}** In the instant case, the crucial distinction is that the evidence illustrates that the fraudulent conduct was not standardized, nor were the representations identical, nor were they set forth on the promissory notes. Rather, the oral representations by Schneider occurred during "negotiations."

**{¶ 33}** Furthermore, we find this court's decision in *Hoang v. E*Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151, analogous to the instant case. In *Hoang*, defendants offered an online investing service, representing fast, accurate, and reliable service. The plaintiff sought class certification, contending that defendant's representations were false and inaccurate. The plaintiff maintained that because of interruptions in service, she and others similarly situated had suffered losses. She argued that every E*Trade customer was injured simply because they could not access their E*Trade accounts during the times of interruption. This court disagreed.

**{¶ 34}** This court reasoned that "[t]his analysis is complex because it requires consideration of each individual transaction, other transactions in the same security that occurred in the market, and the market conditions at the time, including the number of orders waiting to be executed in the market, the size and type of those orders, and other factors." Id. at ¶25. We found that because "establishing liability would require a fact-specific inquiry into the details of every individual transaction" class certification was not suitable. See, also, *Linn v. Roto-Rooter, Inc.*, Cuyahoga App. No. 82657, 2004-Ohio-2559 (class certification was denied where customers were charged a miscellaneous supply fee in connection with services, and a case-by-case analysis of each service call was required to prove liability); *Cannon v. Fid. Warranty Servs., Inc.*, Muskingum App. No. CT2005-0029, 2006-Ohio-4995; and *Faralli v. Hair Today, Gone Tomorrow* (Jan. 10, 2007), N.D.Ohio No.

1:06 CV 504 (class certification was denied where "plaintiffs claims involve[d] highly individualized issues of reliance, causation and damages").

**{¶ 35}** Although all of the plaintiffs claims arise out of similar promissory notes purchased from Schneider, the trial court ignores the fact that liability as to each individual plaintiff's claim involves numerous factors and, therefore, cannot be established in a single adjudication.

**{¶ 36}** Accordingly, FirstMerit's second assignment of error is well taken. Having found that the predominance requirement has not been met, we find the remaining assignments of error to be moot.[3]

Judgment reversed and case remanded.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[3] FirstMerit's remaining assignments of error pertain to the other requirements set forth under Civ.R. 23 for class certification, i.e., typicality, numerosity, adequacy, choice-of-law, and superiority.

COLLEEN CONWAY COONEY, JUDGE

FRANK D. CELEBREZZE, JR., P.J., CONCURS;
LARRY A. JONES, J., DISSENTS WITH SEPARATE OPINION

LARRY A. JONES, J., DISSENTING:

**{¶ 37}** Respectfully, I dissent and would affirm the judgment of the trial court.

**{¶ 38}** In *Cope*, supra, the Ohio Supreme Court stated "* * * when a common fraud is perpetrated on a class of persons, those persons should be able to pursue an avenue of proof that does not focus on questions affecting only individual members. If a fraud was accomplished on a common basis, there is no valid reason why those affected should be foreclosed from proving it on that basis." Id. at 430, citing *Shields v. Lefta, Inc.* (N.D.Ill.1995), 888 F.Supp. 891, 893.

**{¶ 39}** With respect to "claims based on an underlying scheme," the *Cope* court stated that "'[i]t would be senseless to require each of the members * * * to individually assert their fraud claims against the defendants, especially where a single 'underlying scheme,' rather than a variety of distinct misrepresentations, is the fundamental basis for those claims.'" Id. at 432, quoting *In re Am. Continental/Lincoln Sav. & Loan Sec. Litigation* (D.Ariz.1992), 140 F.R.D. 425, 431 ("It is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it, and it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again.")

**{¶ 40}** As the majority noted, each plaintiff in the proposed class signed an identical promissory note. I disagree with the majority's conclusion, however, that the crucial distinction between this case and *Cope* and *Jenson*, supra, is that the fraudulent conduct was not standardized because the Schneider's oral representations occurred during negotiations and may have differed with each plaintiff. Instead, I agree with the trial court's conclusion that questions common to the proposed class members represent significant aspects of the case, i.e., if FirstMerit violated R.C. 1707.43(A) as to any one plaintiff, then it violated it as to all plaintiffs; if the bank and Schneider engaged in a civil conspiracy as to one plaintiff , then they engaged in it as to all plaintiffs; and if the bank aided and abetted fraud as to any one plaintiff, it likely did so as to all the plaintiffs.

**{¶ 41}** Although not controlling, I find that the court's analysis in *Jenson* persuasive. In *Jenson*, the court was similarly faced with a Ponzi scheme and reasoned:

> "Fiserv argues that a fraud case involving materially differing oral representations is not amenable to class treatment, but * * * the 'center of gravity' of the Heath fraud predominates over details of individual communications. * * * The Ponzi scheme itself would have to be proved or controverted over and over were the case not to proceed as a class action. * * * Thus, Heath's underlying fraud may be proved on a class basis. * * *
>
> "Fiserv similarly contends that Jenson must prove that each class member reasonably relied on a material misstatement or omission. However, common issues do not necessarily fail to predominate simply because reliance must be shown. While *Mirkin v. Wasserman*, 5 Cal.4th 1082, 23 Cal.Rptr.2d 101, 858 P.2d 568 (1993), rejected a presumption of reliance on a class-wide basis when the same omission had not been communicated to each class member, * * * , the court continued to recognize that when

> the same material misrepresentations have been communicated, an inference of reliance may arise as to the entire class. * * *. Here, Heath allegedly communicated to each prospect that investors would get a high rate of return, liquidity, and redemption at maturity from their investments, whereas the truth was that their return, if any, would come from the contributions of others. It is not unreasonable in these circumstances to infer reliance by all members.

**{¶ 42}** "Fiserv's contention that there is no common proof that could establish that it knew what Heath told each investor, or that it knew that what Heath told each investor was false, fails for the same reason. Its submission that regardless, there is no common proof which could establish that Fiserv provided any assistance or encouragement to Heath likewise falls short, because whether the class had accounts with Fiserv or not, Fiserv either knew of Heath's scheme to defraud and took steps substantially to advance the scheme or it didn't. Either way, its knowledge and assistance (if any) predominates as a common issue." Id. at 926. (Most internal citations omitted).

**{¶ 43}** Young alleges that FirstMerit aided and participated in the fraud by using "routinized procedures" that enabled Schneider to perpetrate fraud on the plaintiffs. As in *Cope*, the proposed class's claims against FirstMerit "are not based on any oral or affirmative misrepresentations, or any other actionable conduct occurring during * * * sales negotiations" by FirstMerit but on the allegation that FirstMerit aided and/or participated in the fraud Schneider perpetrated on the members of the proposed class through their "routinized" banking procedures. *Cope* at 432-433. If the plaintiffs' allegations are proven as true, an

inference of reliance of each class member may be shown as well as FirstMerit's knowledge of and assistance with the Schneider's scheme to defraud investors. Thus, I would find that the common issues predominate over any individual issues that FirstMerit asserts the class members may have.

**{¶ 44}** Moreover, as the trial court notes, the proposed class may be amended or divided into subclasses pursuant to Civ.R. 23(C) should the evidence warrant such a change.

**{¶ 45}** Finally, we review the trial court's decision in this case for an abuse of discretion. "An abuse of discretion * * * implies a decision which is without a reasonable basis or one which is clearly wrong." *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280. In reviewing the trial court's decision under the abuse of discretion standard, "a presumption of validity attends the trial court's action." *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 549 N.E.2d 1237, at the syllabus. Thus, under this standard, a trial court's findings of fact are to be given substantial deference. I would follow the well-reasoned and thorough opinion authored by the trial court; finding an abuse of discretion is a high burden to overcome and I do not believe it has been met in this case.

**{¶ 46}** Therefore, I would agree with the trial court that the proposed class satisfied the predominance requirement. And although not discussed by the majority pursuant to App.R.

12, I would find that the trial court did not abuse its discretion in finding that the other factors necessary for class certification existed in this case.

**{¶ 47}** Accordingly, I would affirm the judgment of the trial court.